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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Appellant,

v.

PATRICK S. VILLEGAS,

Defendant and Respondent.

C059592

(Super. Ct. No. 06-5168)

A jury found defendant Patrick S. Villegas guilty of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), a lesser included offense of transportation of a controlled substance. In a bifurcated proceeding, the court found true three prior strike allegations (Pen. Code, §§ 667, subds. (b)-(i) & 1192.7) and three prior prison term allegations (*id.*, § 667.5, subd. (b)). The court partially granted defendant's *Romero*¹ motion, dismissing two of his three prior strike convictions, and sentenced defendant to an aggregate term of nine years in state prison.

¹ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

Pursuant to Penal Code section 1238, subdivision (a)(10), the People appeal, claiming the trial court abused its discretion in dismissing the two prior strike convictions.² We will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On September 12, 2006, police stopped defendant, a parolee at large, who was seated in the driver's seat of his pickup truck at a gas station. He was instructed to put his hands in the air, but did not initially comply, instead bending forward toward the steering wheel and then leaning over toward the passenger seat. Defendant eventually complied and was taken into custody. He tested positive for methamphetamine at a level sufficient to indicate use within the last 24 hours.

Police searched defendant's truck and found a pocket knife and a clear plastic baggie containing 1.5 grams of methamphetamine under the front passenger seat. A double-edged knife was also found in the center console. Defendant explained that he had taken the pocket knife from his son and broken it. Defendant's girlfriend, Tanisha Caraveo, later claimed the drugs and one of the knives were hers.

Defendant was charged with transporting a controlled substance (Health & Saf. Code, § 11379, subd. (a)) and

² The People's additional claim that the trial court failed to set forth in the minute order its reasons for dismissing the strike convictions as required by section 1385 is moot given the court's recent modification of its minute order. (See fn. 4, *post.*)

possessing a controlled substance (Health & Saf. Code, § 11377, subd. (a)). The amended information alleged defendant had three prior strike convictions (Pen. Code, §§ 667, subds. (b)-(i), 1192.7) and had served three prior prison terms (*id.*, § 667.5, subd. (b)).

At trial, Caraveo testified that, on the morning of defendant's arrest, she woke up with defendant.³ At approximately 10:00 a.m., he dropped her off at the Dude Motel to visit her friend Jessica, where Caraveo and Jessica smoked methamphetamine together. Defendant picked her up from the Dude Motel at approximately 1:30 p.m. and dropped her off at the house of her friend Lupe, where she continued using methamphetamine until defendant picked her up again at approximately 5:45 p.m. Caraveo had "a 16th" or "about 1.75 grams" of methamphetamine in "a sandwich bag" in her purse. She had traded Lupe the drugs for some clothing she had stolen from an Old Navy store. Caraveo also said she had a knife in her purse, but could not recall what it looked like.

Defendant dropped Caraveo back off at the Dude Motel and picked up his son-in-law to give him a ride to his grandmother's house, then get some gas and come right back. Caraveo said she left her purse with the drugs behind the passenger seat of defendant's truck.

³ She later testified that she and defendant "stayed up all night."

Caraveo said she had been using methamphetamine every day for the last two and a half years. She had seen defendant use methamphetamine only once, on the night prior to his arrest, when they used methamphetamine together from approximately 11:00 p.m. until approximately 3:00 a.m.

The jury found defendant guilty of the lesser included offense of possession of a controlled substance. In a bifurcated proceeding, the court found the three prior strike allegations and the three prior prison term allegations true.

Following a hearing on defendant's *Romero* motion, the court dismissed two of defendant's three prior serious felony convictions, and sentenced defendant to the upper term of three years, doubled pursuant to the remaining strike prior, plus one year for each of the three prior prison terms, for an aggregate term of nine years in state prison.

The People filed a timely notice of appeal.

DISCUSSION

The People contend that, in light of defendant's background, character and prospects and the nature and circumstances of his present felony and past strike convictions, the trial court abused its discretion when it departed from the "Three Strikes" sentencing scheme and dismissed two of defendant's prior strike convictions.

"[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing

such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*)). The exercise of sentencing discretion under the Three Strikes Law "must be an intensely fact-bound inquiry taking all relevant factors, including the defendant's criminal past and public safety, into due consideration." (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 981-982.) The inquiry does not focus solely on the defendant. "[S]ociety, represented by the People, has a legitimate interest in 'the fair prosecution of crimes properly alleged.'" (*Williams, supra*, 17 Cal.4th at p. 159.)

While the trial court has the power to dismiss a strike conviction (*Romero, supra*, 13 Cal.4th at pp. 529-530), we will not disturb the trial court's ruling absent an abuse of discretion (*People v. Gillispie* (1997) 60 Cal.App.4th 429, 434). Under this standard, the inquiry is whether the ruling "falls outside the bounds of reason' under the applicable law and the relevant facts." (*Williams, supra*, 17 Cal.4th at p. 162.) "[A]n appellant who seeks reversal must demonstrate that the trial court's decision was irrational or arbitrary. . . . Where the record demonstrates that the trial court balanced

the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.)

A. Defendant's Background and Record

According to the probation report, defendant was 40 years old at the time he committed the current offense. He was in a relationship with Caraveo. He had four children from a previous relationship and four grandchildren with one on the way. Defendant received his GED in 2002 and obtained a forklift operator certification in 2006. He began working for Pinnacle Builders just days after his release from prison on January 19, 2006, and continued working there until the date of his arrest on September 12, 2006. He had recently been promoted from forklift operator to safety officer.

The probation report notes defendant began using heroin at the age of 16 and continued using it daily. He was able to remain drug-free for 10 years, most of which was time spent in prison. After being paroled in January 2006, he remained drug-free and tested negative on random monthly drug tests until he tested positive for methamphetamine on the day of his arrest.

Defendant had eight prior misdemeanor convictions: a 1984 and a 1989 burglary (Pen. Code, §§ 459, 17, subd. (b)(4)); a 1989 and a 1990 petty theft with priors (*id.*, § 666); a 1984 battery (*id.*, § 242); a 1988 corporal injury on a spouse or cohabitant (*id.*, § 273.5); a 1989 receipt of stolen property

(*id.*, § 496); and a 1990 being under the influence of a controlled substance (Health & Saf. Code, § 11550).

Defendant had four prior felony convictions: two 1991 convictions for robbery (Pen. Code, § 211) for which he was sentenced to three years in state prison; a 1993 conviction for petty theft with priors (*id.*, § 666) for which he was sentenced to 16 months in state prison; and a 1996 conviction for battery with serious bodily injury (*id.*, § 243, subd. (d)) for which he was sentenced to 10 years in state prison.

Defendant's first two strikes stemmed from the 1991 convictions for two separate robberies. The first robbery occurred when defendant entered a convenience store, grabbed a "case" of cigarettes and ran out. When the clerk tried to stop him, he "ran her over and [they] tangled." At the *Romero* hearing, defendant denied the prosecution's allegation that he hit the clerk in the face with his fist, threw her to the ground and hit her in the stomach. He admitted that he "may have pushed her down or maybe accidentally stepped on her," but denied hitting her.

The second robbery occurred when defendant attempted to steal a bag of coins from the idling truck of the victim, who was emptying coins from a newspaper stand. When the victim tried to turn the truck off, defendant grabbed the bag of money and fled. Defendant denied the prosecution's allegation that he pulled a buck knife on the victim and yelled, "I'm going to cut you."

Defendant's third strike stems from a 1996 conviction for battery. According to defendant, the crime involved a physical altercation between defendant and his aunt's husband, Harold Mitchell, that began when defendant's aunt, holding "a bloody rag to her face," said Mitchell "drug me around the yard accusing me of stealing his drugs or whatever." When defendant told Mitchell to leave, Mitchell started beating him up so defendant stabbed him. Defendant denied the prosecution's allegation that defendant and Mitchell were arguing over whether defendant had spanked one of Mitchell's children and, as defendant's mother was yelling at Mitchell, defendant snuck up behind his mother, reached around her and stabbed Mitchell in the stomach.

Defendant was on parole and employed at the time he committed the current offense. During the eight-month period prior to his arrest, defendant tested negative for drugs and complied with all of the conditions of his parole.

According to several of defendant's relatives, defendant reestablished relationships with his family and was getting his life together before he was arrested. Defendant's aunt, Diane Edwards, a drug rehabilitation counselor and a former addict herself, testified that defendant called or visited her two to three times a week. She never suspected him of using drugs during the period prior to his arrest. Edwards described defendant as "a whole new person" after his release on parole.

Defendant's cousin, Amber Kephart, testified that defendant had never been involved with the family, but became involved

after he was paroled, checking in with her and seeing if her daughter needed anything. Kephart never saw defendant using drugs while on parole, and never suspected he was under the influence.

Defendant's daughter, Stephanie Villegas, testified that she was six or seven when her father went to prison in April of 1997. When he was paroled in January 2006, they became close, seeing each other every day. She did not see defendant use drugs or suspect him of doing so during that period.

B. Sentencing

In making its determination whether to dismiss any or all of defendant's prior strikes, the court noted it had discretion to do so in the interest of justice under Penal Code section 1385 and *Romero*, and referenced *Williams, supra*, 17 Cal.4th 148, to explain the factors to be taken into consideration.

First, the court found the current offense was "a nonviolent wobbler offense for drug possession."

Next, in discussing the prior strikes, the court noted that the March 1991 and May 1991 robberies occurred close in time and resulted in a low-term prison sentence. As for the March 1991 robbery, the court opined that the facts, although somewhat disputed, showed "a second degree burglary that went sour, not a planned event in the sense of a planned violent attack." As for the May 1991 robbery, the court did not find credible defendant's denial that he possessed or brandished the buck knife, but nonetheless viewed it as nothing more than an

"opportunistic crime." The court found the 1996 battery to be "factually problematic," noting that the prosecution's version of a calculated attack differed from defendant's stated belief that he needed to protect himself.

Finally, in considering defendant's background, character and prospects, the court found defendant "showed very poor judgment" in using drugs with Caraveo the night prior to his arrest, but observed that defendant's drug use "was very recent" and that he "used it in the context of a relationship." The court went on to state as follows:

"I'm looking at the defendant's mitigating evidence of his character and his prospects for rehabilitation in making a decision in exercising my discretion at least on two strikes.

"Before the defendant tested negative as I recall nine times and had been on parole and supervised on parole and had had no violation during that period of time, his family members testified upon release from prison he had made an effort to reestablish family ties, which he has not done, matter of fact using heroin since 16 and basically had no real involvement with his family until this time.

"Now I'm not naive as to the inclination of family members to be kindly toward their relatives' use of self-interest, but in this case one of the witnesses in particular was an employee of The Effort, which is a treatment facility known in the community over a period of 15 years and I choose to think she would not come in here and lie about his change and his efforts once he got out of prison. He -- in addition to reestablishing

family ties and remaining clean during that period of time with rather strict supervision from parole he had full-time employment with Pinnacle Builders. He had received a forklift operator certificate and had been promoted to the company safety officer. And the set of circumstances given his prior history of incarceration is rather unusual and impressive.

"Based on these facts and the seriousness of the defendant's present and/or the relative seriousness of the present offense, the court finds the interest of justice would be served by applying *Romero* and hereby exercises its discretion to strike the defendant's prior felony conviction for the [Penal Code section] 243(d), which involved a family dispute, and the one [Penal Code section] 211, which was I think a second degree burglary which evolved into a fight and sentence as follows:

"I'm going to sentence him to a base term of three years on [Health and Safety code section] 11377 and I select the upper term in light of the defendant's prior conviction and prior prison terms and his parole status at the time of the offense.

"That sentence will be doubled to six years for one prior conviction for a serious felony under [Penal Code section] 667[, subdivision (e)(1)]. And with the three-year enhancement for the prior prison term and [Penal Code section] 667.5, he'll be remanded to the Department of Corrections [and Rehabilitation] for a period of nine years. . . ."⁴

⁴ The court's original minute order did not set forth the court's reasons for dismissing the two prior strikes. However,

C. Analysis

Citing *People v. Strong* (2001) 87 Cal.App.4th 328, 338-340 (*Strong*), the People contend defendant's "long record of repeated offenses qualifies him as a 'revolving door career criminal' who is not outside the spirit of the Three Strikes Law." To support that claim, the People analogize these facts to those in *Strong, supra*, 87 Cal.App.4th 328, *Williams, supra*, 17 Cal.4th 148, and *People v. Gaston* (1999) 74 Cal.App.4th 310 (*Gaston*). We are not persuaded.

In *Strong*, the defendant "had a 22-year criminal record, comprised of six felonies within the past eight years and 12 misdemeanors; his sole strike--an unprovoked and violent assault with a knife on a bystander--occurred only three years before his current offense--the sale of a substance falsely

in an amended minute order, the trial court set forth its reasons as follows:

"In deciding whether to strike prior convictions, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background[,] character, and prospects, the defendant may be deemed outside the scheme's spirit. [¶] The nature and circumstances of defendant's present offense favor striking defendant's prior conviction for violation of Penal Code section 243(d) and one of his prior convictions for violation of Penal Code section 211. Defendant's current offense is a nonviolent wobbler offense, Health and Safety Code section 11377(a). [¶] The particulars of defendant's background, character, and prospects similarly favor striking these convictions. Defendant has made an effort to reestablish family relationships and obtain full-time employment. [¶] Based on these factors, the court exercises its discretion to strike defendant's prior conviction for violation of Penal Code section 243(d) and one of his prior convictions for violation of Penal Code section 211."

represented to be cocaine." (*Strong, supra*, 87 Cal.App.4th at p. 331.) The current offense, committed while the defendant was still on parole for an assault with a deadly weapon conviction, involved the defendant approaching an undercover officer on the street and offering to sell him narcotics. (*Id.* at p. 332.) During the transaction, the defendant warned the officer that he had a gun and was not to be "'messed with.'" (*Ibid.*) The trial court dismissed the strike prior on the grounds that the current offense was "'relatively non[]threatening because it did not involve any actual controlled substance,'" the defendant had "'reached an age where statistically he pose[d] a reduced risk to society,'" defendant's record was "'devoid of violence or threat of violence except for the strike, which did not involve a firearm,'" and that the defendant's record "'consist[ed] of petty acquisitive offenses and substance abuse,'" the defendant had no record of firearm possession or use, and his "'one prior strike appear[ed] to be out of character in view of his record." (*Strong, supra*, 87 Cal.App.4th at p. 334.) This court disagreed with the trial court's reasoning and reversed. We concluded: "[D]efendant's lengthy criminal record, including 12 misdemeanors within a 22-year period and six felonies within the past eight years, including a recent, violent assault that qualified as a strike, and a current felony that was committed while defendant was still on parole from his strike, squarely brought defendant within both the letter and

spirit of the Three Strikes law.” (*Strong, supra*, at p. 346; see *id.* at pp. 344-346.)

The facts in *Strong* differ from those now before us. Here, defendant also has a 22-year criminal record, comprised of four felonies within the past 15 years and eight misdemeanors. He has three prior strikes, the most recent of which -- a battery involving an assault with a knife on a relative -- occurred 10 years prior to his current offense. However, unlike *Strong*, the court here found the details of the 1996 assault “factually problematic,” allowing for an interpretation that defendant was not the aggressor, but rather that he believed he had to stab the victim to protect himself. The court also found the two prior robberies were opportunistic crimes, and the March 1991 robbery in particular did not appear to be “a planned violent attack.” Unlike *Strong*, where the defendant’s current offense “posed a threat of violence” (*Strong, supra*, 87 Cal.App.4th at p. 334), the trial court here characterized the current offense as “a nonviolent wobbler offense for drug possession.” Unlike *Strong*, defendant here did not initiate the current offense and thus there was no evidence that the crime entailed planning. (*Ibid.*) And defendant had been gainfully employed.

Williams and *Gaston* are distinguishable as well. The defendant in *Williams* had a 19-year criminal history which included attempted robbery and rape convictions that qualified as strikes. (*Williams, supra*, 17 Cal.4th at p. 154.) He had had a substance abuse problem since the age of nine, was unemployed and lived alone, but had two children from a prior

relationship. (*Id.* at p. 155.) He pleaded guilty to driving a vehicle while under the influence of PCP. (*Id.* at pp. 152, 156.) The trial court dismissed the 1982 attempted robbery conviction because it was approximately 13 years old and because the defendant had not engaged in violent crimes since then. (*Id.* at pp. 156-157.) The Court of Appeal reversed, finding the trial court abused its discretion in light of the defendant's "'extraordinary record of prior criminality.'" (*Id.* at p. 157.)

The state high court agreed and affirmed the Court of Appeal, ruling: "In light of the nature and circumstances of his present felony of driving under the influence, which he committed in 1995, and his prior conviction for the serious felony of attempted robbery and his prior conviction for the serious and violent felony of rape, both of which he suffered in 1982, and also in light of the particulars of his background, character, and prospects, which were not positive, Williams cannot be deemed outside the spirit of the Three Strikes law in any part, and hence may not be treated as though he had not previously been convicted of those serious and/or violent felonies." (*Williams, supra*, 17 Cal.4th at pp. 162-163.) The fact that 13 years had passed between his prior strikes and his present felony was "not significant" in the eye of the court because "[h]e did not refrain from criminal activity during that span of time, and he did not add maturity to age." (*Id.* at p. 163.)

Likewise, in *Gaston*, the defendant was convicted in 1998 of unlawful driving or taking of a vehicle and receiving stolen

property. (*Gaston, supra*, 74 Cal.App.4th at p. 313.) His criminal history spanned almost his entire adult life, including two 1981 strike convictions (one for armed robbery and one for kidnapping) and numerous other felonies. He served multiple prison terms and was returned to prison for violations of parole, and spent a significant amount of time in county jail when he was not in prison. He was on parole when he committed the present crimes. (*Id.* at pp. 312-313, 319.) The trial court dismissed the prior armed robbery conviction based on the “remoteness in time of the prior felonies” which occurred approximately 17 years ago, the defendant’s “age, [and] his [diabetic] medical condition,” the defendant’s “four prior prison felonies, and [his apparent inability] to keep his hands off other people’s property,” and the fact that his “rather long history of criminal involvement” consisted of felonies that were neither serious nor violent. (*Id.* at pp. 315-316.) With respect to his background, character and prospects, the court noted the defendant was currently homeless and had been unemployed for the past five years. (*Id.* at pp. 319-320.)

The Court of Appeal disagreed with the trial court’s findings and reversed, concluding Gaston had an “unrelenting record of recidivism, even while on parole or probation from previous felony convictions,” and that “he is the kind of revolving-door career criminal for whom the Three Strikes law was devised.” (*Gaston, supra*, 74 Cal.App.4th at p. 320.)

Here, unlike *Williams* and *Gaston*, defendant did refrain from criminal activity during the period prior to his arrest,

testing negative for illegal substances and avoiding parole violations. He did add maturity to age, reestablishing close ties with family members, something he had not done for many years. Most notably, his aunt, a former addict and a drug rehabilitation counselor, attested to the positive change she saw in defendant, stating he was "a whole new person." Defendant obtained full-time employment immediately after being released on parole, and maintained that employment until his arrest.

Based on those facts and the remaining evidence regarding defendant's current and prior offenses, the trial court concluded defendant was indeed outside the spirit of the Three Strikes law and granted defendant's *Romero* motion. The ruling was not beyond the bounds of reason. (*Williams, supra*, 17 Cal.4th at p. 162.) There was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

_____, J.
BLEASE

We concur:

_____, P. J.
SCOTLAND

_____, J.
SIMS